

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

SAN LUIS & DELTA-MENDOTA WATER
AUTHORITY; WESTLANDS WATER
DISTRICT,

Plaintiffs,

v.

KENNETH LEE SALAZAR, as
Secretary of the Interior, et
al.,

Defendants,

NATURAL RESOURCES DEFENSE
COUNCIL and THE BAY INSTITUTE,

Defendant-Intervenors.

1:09-CV-00407 OWW DLB

MEMORANDUM DECISION AND
ORDER RE EVIDENTIARY
OBJECTIONS RE PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION

I. INTRODUCTION

This case concerns the United States Fish and Wildlife Service's ("FWS") December 15, 2008 biological opinion ("BiOp" or "2008 BiOp") concerning the impact of coordinated operations of the Central Valley Project ("CVP") and State Water Project ("SWP") on the threatened delta smelt. San Luis & Delta-Mendota Water Authority ("Authority") and Westlands Water District ("Westlands") (collectively "Plaintiffs") moved for a preliminary injunction to enjoin the application of Component 2 of the

1 Reasonable and Prudent Alternative ("RPA") in the BiOp, which
2 imposes certain flow restrictions on CVP operations in the Old
3 and Middle Rivers ("OMR") of the Sacramento-San Joaquin Delta.
4 Doc. 31, filed April. 24, 2009 (Notice of Mot.); Doc. 32 (Mem. in
5 Sup. of Mot.). The motion was heard May 22, 2009.

6 Plaintiffs' underlying complaint and motion for preliminary
7 injunction raise claims against FWS based on the Endangered
8 Species Act ("ESA") and the National Environmental Policy Act
9 ("NEPA"). Plaintiffs have filed numerous supporting
10 declarations. Docs. 34-47, 71, 73-76, 78. Federal Defendants
11 oppose the imposition of an injunction, and filed several
12 declarations. Doc. 56. Environmental Intervenors, Natural
13 Resources Defense Council ("NRDC") and The Bay Institute, also
14 oppose injunctive relief and filed an opposing declaration. Doc.
15 58. Before the court for decision are various evidentiary
16 objections raised by the parties in connection with the motion
17 for preliminary injunction.

18 19 II. ANALYSIS

20 A. Objections to Evidence of Economic Harm.

21 Environmental Intervenors object to the following
22 declarations, or portions thereof, on the ground that they
23 discuss alleged economic costs, including water export and
24 delivery reductions, that might result from implementation of the
25 challenged flow restrictions: Todd Diedrich; Shawn Coburn; Todd
26 Allen; John Harris; Joan Maher, ¶¶ 5-21, 23-26; Russ Freeman, ¶¶
27 3-24, and Exhibit A; Daniel Nelson, ¶¶ 3-13; James Snow, ¶¶ 9-10,
28 15-19; Dana Wilkie, ¶ 7; Robert Silva, ¶¶ 3-4; Marcia Sablan, ¶¶

1 3-7; and Baldomero Hernandez, ¶¶ 2, 6.

2 The Ninth Circuit has restricted the type of evidence that
3 may be considered in deciding motions for injunctive relief in
4 ESA cases. *Nat'l Wildlife Fed'n v. NMFS*, 422 F.3d 782, 793-94
5 (9th Cir. 2005) (*NWF v. NMFS I*) ("The traditional preliminary
6 injunction analysis does not apply to injunctions issued pursuant
7 to the ESA."); *Pac. Coast Fed'n of Fisherman's Ass'ns v.*
8 *Gutierrez*, --- F. Supp. 2d ---, 2008 WL 2851568, *6-*7 (E.D. Cal.
9 2008).

10 "In cases involving the ESA, Congress removed from the
11 courts their traditional equitable discretion in
12 injunction proceedings of balancing the parties'
13 competing interests." [*Nat'l Wildlife Fed'n v.*
14 *Burlington N. R.R., Inc.*, 23 F.3d 1508, 1511 (9th Cir.
15 1994).] As the Supreme Court has noted, "Congress has
16 spoken in the plainest of words, making it abundantly
17 clear that the balance has been struck in favor of
18 affording endangered species the highest of
priorities." *TVA v. Hill*, 437 U.S. 153, 194 (1978).
Accordingly, courts "may not use equity's scales to
strike a different balance." *Sierra Club v. Marsh*, 816
F.2d 1376, 1383 (9th Cir. 1987); see also *Marbled*
Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996)
("Congress has determined that under the ESA the
balance of hardships always tips sharply in favor of
endangered or threatened species.").

19 *NWF v. NMFS I*, 422 F.3d at 793-94 (parallel citations omitted);
20 see also *TVA*, 437 U.S. at 187-88 (concluding that Congress
21 determined in the ESA that the value of endangered species is
22 "incalculable" and prohibiting the balancing of economic harms
23 against the Congressionally determined public interest in
24 preserving endangered species); *Nat'l Ass'n of Home Builders v.*
25 *Defenders of Wildlife*, 127 S. Ct. 2518, 2537 (2007) (reaffirming
26 holding from *TVA* that economic burden of enforcing the ESA cannot
27 be considered by the courts, concluding that "the ESA's
28 no-jeopardy mandate applies to every discretionary agency

1 action-regardless of the expense or burden its application might
2 impose"); *Nat'l Wildlife Fed'n v. Burlington N. R.R., Inc.*, 23
3 F.3d 1508, 1510-11 (9th Cir. 1994) ("In cases involving the ESA,
4 Congress removed from the courts their traditional equitable
5 discretion in injunction proceedings of balancing the parties'
6 competing interests."); *Sierra Club v. Marsh*, 816 F.2d 1376, 1383
7 (9th Cir. 1987) (courts "may not use equity's scales to strike a
8 different balance"); *Marbled Murrelet v. Babbitt*, 83 F.3d 1068,
9 1073 (9th Cir. 1996) ("Congress has determined that under the ESA
10 the balance of hardships always tips sharply in favor of
11 endangered or threatened species.").

12 Plaintiffs suggest that *Winter v. Natural Resources Defense*
13 *Council*, 129 S. Ct. 365 (2008), overrules this long line of
14 precedent, by holding that "[i]n each case, courts 'must balance
15 the competing claims of injury and must consider the effect on
16 each party of the granting or withholding of the requested
17 relief.'" 129 S. Ct. at 376 (citing *Amoco Production Co. v.*
18 *Gambell*, 480 U.S. 531, 542 (1987))(emphasis added).¹ It is not
19

20 ¹ *Winter* is arguably inapplicable to a claim brought
21 under the ESA. Although the plaintiffs in *Winter* originally
22 brought claims under both the ESA and NEPA, *Winter*, 129 S. Ct. at
23 372, the district court entered a preliminary injunction against
24 the Navy based upon showing a likelihood of success on the NEPA
25 claim, not the ESA claims. *Id.* at 374, n. 4. The Ninth Circuit
26 and Supreme Court opinions explained and recognized that the
27 subject sonar testing had significant adverse effects on
28 individual members of ESA-listed species. See, e.g., *NRDC v.*
Winter, 518 F.3d 658, 691-692 (9th Cir. 2008); *Winter*, 129 S. Ct.
at 374. But, these passing references to the ESA status of the
species affected by the sonar testing do not alter the fact that
the district, appellate, and Supreme Court opinions analyzed only
the NEPA claims.

1 necessary to resolve the impact of *Winter* on the Ninth Circuit's
2 ESA injunctive relief jurisprudence at this stage of the
3 litigation, because Plaintiffs have demonstrated a likelihood of
4 success on their NEPA claim. It is undisputed that evidence of
5 economic harm is admissible in the context of a request for
6 injunctive relief under NEPA.

7 Environmental Intervenors objection to the admission of
8 economic harm evidence is OVERRULED for purposes of the NEPA
9 claim.

10
11 B. Environmental Intervenors' Objection to Evidence of
12 Potential Environmental Harm.

13 Environmental Intervenors further object to Plaintiffs'
14 "attempt to characterize some of these irrelevant economic costs
15 as alleged 'environmental harms' by, for example, discussing the
16 potential impact of increased groundwater pumping conducted to
17 make up for reduced CVP deliveries." Doc. 60 at 4.

18 Environmental Intervenors argue that any such increased
19 groundwater pumping or related actions "would be voluntary
20 actions taken by Plaintiffs or its constituents to mitigate for
21 alleged economic costs of reduced CVP water deliveries." *Id.*

22 The only legal support Environmental Intervenors offer for
23 this position is a quote from *NRDC v. Kempthorne*, 2008 WL
24 5054115, *18 (E.D. Cal. Nov. 19, 2008), where the district court
25 considered environmental plaintiffs' argument that the Bureau was
26 unlawfully making "contractual promises of excessive water
27 deliveries that the Bureau cannot meet," and that "[o]nly a more
28 realistic allocation of CVP water in the contracts following a

1 valid ESA consultation can cure this problem." The district
2 court rejected this argument, reasoning:

3 These are political, not legal arguments. Whether and
4 to what extent water users take actions based upon
5 contractual promises to provide water service that
6 historically have rarely, if ever, been met in full is
7 not cognizable under the ESA, which deliberately
8 prohibits the federal courts from considering the
9 economic impacts of actions taken to protect listed
10 species

11 *Id.* This discussion has nothing to do with whether environmental
12 harms purportedly triggered by federal agency action requiring
13 land fallowing may be considered in the balance of the harms when
14 reviewing a request for injunctive relief in a NEPA case. NEPA
15 requires consideration of such indirect environmental impacts,
16 along with any indirect "aesthetic, historic, cultural, economic,
17 social, or health" impacts, so long as they are "reasonably
18 foreseeable." 40 C.F.R. § 1508.8.² Environmental Intervenor's
19 objection is without merit and is OVERRULED.

20
21 C. Objections to Fact Witness Declarations.

22 Environmental Intervenor's also object to the following fact
23 witness declarations under Federal Rules of Evidence 602 and 701
24 on the ground that they offer improper expert opinions and lack
25 foundation: Dana Wilkie, ¶ 7; Robert Silva, ¶¶ 3-4; Marcia
26 Sablan, ¶¶ 3-7; Baldomero Hernandez, ¶¶ 2, 6. None of these
27 witnesses have been designated or accepted as experts.

28 ² Environmental Intervenor's have not argued that the
environmental impacts raised in Plaintiffs' declarations are not
the reasonably foreseeable result of the challenged agency
action. Even if such an argument had been made, it would go to
the weight, not the admissibility of any such evidence.

1 Federal Rule of Evidence 602 limits lay witness testimony to
2 factual matters of which the witness has personal knowledge.
3 Federal Rule of Evidence 701 limits opinion testimony by lay
4 witnesses to "opinions or inferences which are (a) rationally
5 based on the perception of the witness, (b) helpful to a clear
6 understanding of the witness' testimony or the determination of a
7 fact in issue, and (c) not based on scientific, technical, or
8 other specialized knowledge within the scope of Rule 702
9 [Testimony by Experts]." "The admissibility of lay opinion
10 testimony under Rule 701 is committed to the sound discretion of
11 the trial judge...." *Nationwide Transp. Fin. v. Cass Info. Sys.*
12 *Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *United States*
13 *v. Yazzie*, 976 F.2d 1252, 1255 (9th Cir. 1992)).

14 Environmental Intervenors argue that each of the objected-to
15 declarants "opines on complex subjects such as the alleged cause
16 of unemployment in the San Joaquin Valley, increasing demand at
17 local food banks, declining police protection, or increasing
18 crime rates, attributing all of these social ills to reduced
19 water deliveries caused by implementation of the 2008 [BiOp].
20 However, none of these witnesses demonstrates the specialized
21 knowledge required to opine on these matters."³ Doc. 60 at 6.
22 Environmental Intervenors further argue that the identified
23

24 ³ Environmental Intervenors further argue that the
25 opinions of the objected-to declarants "are contradicted by both
26 the facts, as reflected in current state and federal data
27 regarding unemployment in the Valley, and expert opinions
28 regarding the primary cause of that unemployment and related
effects" citing the Declaration of Jeffrey A. Michael, Ph.D.
But, this goes to the weight, not the admissibility, of these
declarations.

1 paragraphs in each declaration are inadmissible because they are
2 (1) not based on facts of which the witness has personal
3 knowledge, and (2) the opinions offered therein are not
4 rationally based on the witness's own perception, or helpful to
5 the Court's determination of facts at issue. *Id.* at 7.
6 Plaintiffs rejoin, generally, that the declarations properly
7 contain only simple observations and logical inferences based on
8 those observations. Doc. 69 at 7.

9 As to Ms. Wilkie, Environmental Intervenors object to the
10 following paragraph:

11 I believe that the increase in the number of hungry
12 people in out southern San Joaquin counties is directly
13 related to the restrictions on the availability of
14 water to the farms in our area. My belief is based on
15 the fact that the need for assistance began to increase
16 at approximately the same time the zero water
17 allocations for our irrigation districts were
18 announced, and the farmers started to lay off their
19 employees, which significantly increased unemployment
20 in our area.

21 Doc. 47 at ¶7. Plaintiffs point out that, as the CEO of a large
22 community food bank that serves Fresno, Madera, and Kings
23 Counties, *id.* at ¶1, she is familiar with and knowledgeable of
24 the demands of the food bank and the individuals that it serves.
25 Doc. 69 at 9. It is reasonable to infer that she is familiar
26 with the reasons why the individuals served by the food bank are
27 unemployed and/or underemployed. Her opinion that the increased
28 demand for food services is caused, at least in part, by low
water allocation is based upon her personal observations and
knowledge, not any impermissible scientific, technical, or other
specialized knowledge. This lay opinion evidence is admissible.
Environmental Intervenors' objection is **OVERRULED** as to paragraph

1 7 of the Wilkie declaration.

2 Mr. Silva is the mayor of Mendota and has been involved in
3 city government, education, and commerce for 20 years. Doc. 45,
4 Silva Decl. at ¶1. Environmental Intervenors object to the
5 following paragraphs from his declaration:

6 3. The hydrologic and regulatory drought has
7 resulted in a zero water allocation from the Bureau of
8 Reclamation ("Reclamation") to Westlands Water
9 District, our region's primary supplier of water. The
10 complete lack of irrigation water has caused the
11 majority of the farmers in and around Mendota to leave
12 their fields fallow. As a result, there have been
13 significant layoffs from farms and agriculture support
14 industries, and/or practically no hiring of seasonal
15 labor. The current unemployment rate in Mendota is
16 40%. This unemployment rate represents more than a 10%
17 increase since November 2008. Mendota's current rate
18 of unemployment is one of the highest in California and
19 in the nation.

20 4. The City of Mendota contracts with the Fresno
21 County Sheriff for police protection services. The
22 Sheriff has recently notified the city that there has
23 been an increase in the crime rate in the city. In
24 2008, there was an 11% increase in the crime rate as
25 compared to 2007. The percent increase in certain
26 crimes, like aggravated assault, almost doubled in
27 2008. The city does not have crime statistics for
28 2009. Since the effects of the water restrictions were
already beginning to impact the farm economy last year,
I believe that this increase in the crime rate can
largely be attributed to the significant increase in
unemployment during the same time period. The city has
plans to start its own police department in an effort
to increase the safety of our community. However,
since the water restrictions have depressed the farm
economy in our region, the availability of funding for
needed city polic[e] protection is uncertain.

23 *Id.* As a local government official, Mr. Silva is familiar with
24 water supply, economic, employment, and community safety issues,
25 including availability of funding for police services, affecting
26 the City and residents he represents. This lay opinion evidence,
27 which is not scientific or technical in nature, is admissible.
28 Environmental Intervenors' objection is OVERRULED as to the Silva

1 Declaration.

2 Ms. Sablan, is the mayor of Firebaugh and has been involved
3 in the community for 30 years. Doc. 44 at ¶1. Environmental
4 Intervenor object to the following paragraphs of her
5 declaration:

6 3. The drought and the regulatory pumping
7 restrictions on the operation of the Central Valley
8 Project ("CVP") have already significantly impacted the
9 community of Firebaugh. The lack of water is causing
10 agricultural workers in Firebaugh and the surrounding
communities to lose their jobs, resulting in a loss of
livelihood and inability to provide for their families,
and increases in negative social and economic impacts
on the communities that depend on them.

11 4. In response to the significant pumping
12 restrictions, many farmers have been unable to plant
13 large portions of the areas surrounding Firebaugh, and
14 many of the areas planted in permanent crops are barely
being sustained. The direct and indirect impact of the
loss of farming has resulted in a rise in unemployment.
The current unemployment rate in Firebaugh is 40%.

15 5. As a result of the unemployment resulting from
16 hydrologic conditions and regulatory drought, many
17 people in Firebaugh are hungry. In an effort to
18 address the crisis, the City of Firebaugh has
19 undertaken several food drives. Once a month for the
20 last three months, the City of Firebaugh has provided,
21 with the assistance of corporate sponsorships and large
22 farmers, an average of 1,000 meal boxes to people in
the community. As the spring and summer progress, the
number of hungry people in Firebaugh could potentially
increase. While the City of Firebaugh is working to
provide assistance, our efforts are not likely to be
enough to avoid the significant impacts of hunger,
particularly if unemployment continues to increase.

23 6. The significant agricultural land fallowing in and
24 around Firebaugh is a direct result of the CVP delivery
25 restrictions. As a result of the loss of agricultural
26 production, there has been a significant reduction in
27 local sales tax revenue.... These losses ... have
28 caused the City of Firebaugh to lay off three of its
key upper level staff. As the size of the City of
Firebaugh's staff has always been small as compared to
other city governments, these layoffs are significant
and will greatly impact city services. If the City of
Firebaugh's tax revenue continues to decrease, it is
possible that fire and police protection services will

1 be faced with substantial cuts....

2 7. School enrollment ... has also been affected. The
3 Schools in the rural areas around Firebaugh have
4 experienced declining enrollment because the
5 significant farm layoffs have resulted in dislocation
6 of employees that had lived in on-farm housing. Many
7 of these families with children have moved in with
8 family or friends in town, often increasing the number
9 of people living in a home in Firebaugh to include two
10 or three families. The standard of living of the
families with children moving into our City of
Firebaugh schools has therefore declined significantly,
and the crowding and stressful home life may be
impacting the children's academic performance. At the
same time, the schools in the rural areas around
Firebaugh are losing significant state funding as every
child that leaves results in a \$5,000 loss in annual
income to the schools....

11 Doc. 44. Like Mr. Silva, as an elected official of the City of
12 Firebaugh, Ms. Sablan has a duty to be familiar with the
13 economic, education, and water supply conditions impacting the
14 residents of the City. Her statements are admissible lay opinion
15 evidence based on personal knowledge. Environmental Intervenors'
16 objections to Ms. Sablan's declaration are OVERRULED.

17 Finally, Environmental Intervenors object to paragraphs 2
18 and 6 of the declaration of Baldomero Hernandez, the principal of
19 Westside Elementary School, located approximately 45 miles
20 southwest of Fresno. Doc. 45 at ¶1. Paragraphs 2 and 6 provide:

21 2. The community that surrounds Westside is rural and
22 heavily reliant on farming. The farmers in our area
23 are fallowing their fields because they do not have
24 enough water to sustain their crops. As a result, many
25 people are losing their jobs. The parents of our
26 students are among those most affected by the layoffs.
27 Many of the parents of our students are leaving the
28 area to find work.

6. The families of our students are struggling.
Since the farm layoffs started, I have received many
requests for assistance from families. Many are
hungry. There also appears to be a large number of
parents separating.

1 Doc. 41. Plaintiffs are correct that, as the principal of a
2 grade school, it is normal for Mr. Hernandez to be reasonably
3 familiar with the academic and personal issues facing the
4 students and families that his school serves. Nothing in his
5 declaration is scientific or technical in nature. Rather, his
6 statements and opinions are based his own personal observations
7 and knowledge. Environmental Intervenors' objections to the
8 Hernandez declaration are OVERRULED.

9
10 D. Plaintiffs' Objection to the Declaration fo Jeffrey A.
11 Michael.

12 Plaintiffs object to the Declaration of Jeffrey A. Michael,
13 Doc. 58-2, on the grounds that his testimony violates Federal
14 Rules of Evidence 702, 402 and 403. Federal Rule of Evidence 702
15 only allows expert testimony in the form of an opinion or
16 otherwise if:

17 (1) the testimony is based upon sufficient facts or
18 data, (2) the testimony is the product of reliable
19 principles and methods, and (3) the witness has applied
20 the principles and methods reliably to the facts of the
21 case. Fed. R. Evid. 402.

22 The test for reliability "is not the correctness of the expert's
23 conclusions but the soundness of his methodology." *Daubert v.*
24 *Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995).
25 In reviewing proffered expert testimony, the court serves as a
26 gatekeeper and has considerable discretion in determining its
27 reliability and the methods and factors to consider in making
28 that determination. *United States. v. Hankey*, 203 F.3d 1160,
1167-1168 (9th Cir. 2000). "[I]n discharging its gatekeeping
obligation," a court may consider "1) whether a theory or

1 technique can be tested; 2) whether it has been subjected to peer
2 review and publication; 3) the known or potential error rate of
3 the theory or technique; and 4) whether the theory or technique
4 enjoys general acceptance within the relevant scientific
5 community." *Id.* at 1168.

6 Expert testimony must not only be reliable, it must also be
7 relevant. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509
8 U.S. 579, 591 (1993) ("Expert testimony which does not relate to
9 any issue in the case is not relevant, and ergo, non-helpful.")
10 (quoting 3 Weinstein & Berger 702[02], p. 702-18); see also
11 *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1184 (9th Cir. 2002)
12 ("Whether testimony is helpful within the meaning of Rule 702 is
13 in essence a relevancy inquiry."). Federal Rule of Evidence 402
14 states that "[e]vidence which is not relevant is not admissible."
15 Federal Rule of Evidence 403 states that relevant evidence "may
16 be excluded if its probative value is substantially outweighed by
17 the danger of ... confusion of the issues."

18 Plaintiffs first argue that Dr. Michael's methods and
19 opinions "cannot be reliably applied to the facts of this
20 motion." Doc. 68 at 3. Specifically, Plaintiffs object that Dr.
21 Michael relied upon "employment data collected on region-wide
22 scales such as Metropolitan Statistical Areas and County levels,"
23 and that this is "too coarse a grain of analysis for the issues
24 in this motion," because this data "does nothing to illuminate or
25 expound on the individual hardships caused by potential water
26 shortages to specific people and the smaller geographic areas
27 such as the water districts, water users, and the smaller hamlets
28 on the Westside of the San Joaquin Valley...." *Id.* Plaintiffs

1 point out that Dr. Michael admits that the data he employs does
2 not account for farm layoffs on the Westside of the San Joaquin
3 Valley because "[t]he State does not release current payroll data
4 at the sub-county level." Michael Decl. at ¶8. Plaintiffs also
5 emphasize that while he maintains that agricultural employment is
6 rising, Dr. Michael also admits that "[b]ecause some fields have
7 been fallowed in response to reduced water deliveries, there will
8 be fewer farm workers required during the harvest season." *Id.*
9 at ¶13. These objections go to the weight, not the admissibility
10 of Dr. Michael's opinions, which are marginally relevant at a
11 "macro" level.

12 In response to Dr. Michael's declaration, Plaintiffs offer
13 the testimony of Dr. Richard Howitt of the University of
14 California at Davis, an agricultural economics professor, who
15 confirms these shortcomings. Howitt Decl. at ¶ 9. Dr. Howitt
16 opines that the above-described flaws render the Michael
17 Declaration's data and methods "largely irrelevant to the
18 question of measuring the incremental loss in employment due to
19 water reductions to the Westside of the San Joaquin valley." *Id.*

20 Alternatively, Plaintiffs argue that the Michael Declaration
21 is irrelevant and risks confusing the issues in this case:

22 By offering the Michael Declaration, Proposed
23 Intervenor apparently attack the straw man proposition
24 that all current economic ills in the San Joaquin
25 Valley are a result of pumping restrictions. However,
26 the Plaintiffs have never made this claim, and under
27 Federal Rule of Evidence 402, this issue is irrelevant
28 to the current preliminary injunction motion. Also, as
explained above in Section II.A, the Michael
Declaration uses inappropriate data that is
inapplicable and unhelpful to the issues in this
motion, which also renders it irrelevant. Finally, the
declaration's focus on macro-economic indicators and
forecasts is confusing even if somehow relevant and

1 therefore it should be excluded under Federal Rule of
2 Evidence 403. As a result of Proposed Intervenor's
3 misguided macro-economic focus, the Michael Declaration
4 addresses an entirely separate and irrelevant issue,
5 opining that the major cause of the economic troubles
6 in the San Joaquin Valley is the result of the
7 nationwide recession, foreclosure crisis, and credit
8 crunch. For example, Dr. Michael opines that "data
9 suggests that local unemployment is being primarily
10 driven by the foreclosure crisis, real estate crash,
11 and credit crunch." (Michael Declaration ¶ 7.)
12 (emphasis added) Elsewhere, Dr. Michael states "the
13 distress in this region is being primarily driven by
14 the housing collapse, and the broad recession sweeping
15 across the globe." (Michael Declaration ¶ 14.)
16 (emphasis added) He also concludes that "[c]urrent data
17 does not support the claim that farm layoffs are behind
18 rising local unemployment." (Michael Declaration ¶ 14.)

19 As explained in Section II.A, above, and as confirmed
20 by the testimony of Dr. Richard Howitt of the
21 University of California at Davis, Dr. Michael only
22 looked at regional, countywide statistics because he
23 used only coarse grained, macro-economic data. (Howitt
24 Decl. ¶ 9) Accordingly, Dr. Howitt concludes that the
25 Michael Declaration's data and opinions are "largely
26 irrelevant to the question of measuring the incremental
27 loss in employment due to water reductions to the
28 Westside of the San Joaquin Valley." (*Id.*) This is so
because the Michael 702 is unhelpful and for failure to
apply the principles and methods to the facts of this
case.

Doc. 68 at 5-6.

19 Although Plaintiffs' objections and the Howitt declaration
20 question the weight the trier of fact should give Dr. Michael's
21 declaration, they do not undermine its admissibility. Plaintiffs
22 do not question his methods relative to the limited, region-wide
23 conclusions he reaches. As to relevancy, Mr. Michael's
24 declaration provides information about overall trends in
25 employment in the Central Valley, which help to provide broad
26 context applicable to the regional economy, and for the more
27 specific information provided by other declarants with respect to
28 the societal conditions in those communities on the West side of

1 the San Joaquin Valley that are most dependent on CVP water
2 deliveries.

3 Plaintiffs' objections to the Michael Declaration are
4 OVERRULED.

5
6 III. CONCLUSION

7 For the reasons set forth above, all of the evidentiary
8 objections raised by Environmental Intervenors and Plaintiffs are
9 OVERRULED.

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11 SO ORDERED

12 Dated: May 29, 2009

13
14 /s/ Oliver W. Wanger
15 Oliver W. Wanger
16 United States District Judge
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